KEDAH KELANG PAPAN SDN. BHD.

v.

HANSOL SDN. BHD. & ANOR.

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 24-17-87 (ENCLAUSE 22)]
28 DECEMBER 1987

CIVIL PROCEDURE: *Judgment Creditor - Judgment Debtor - Garnishee - Order 49 r. 1 of the Rules of the High Court 1980 - Debt payable in presenti.*

On 9 August 1987 the Senior Assistant Registarar of the Court made absolute a garnishment order *nisi* against the garnishee, directing the garnishee to satisfy the judgment recorded by the judgment creditor against the judgment debtor, out of certain sums of money which were alleged to be owing or accruing from the garnishee to the judgment debtor.

The sole issue which arose in this appeal from that decision was whether the sum of RM101,716.51 already earned by the judgment debtor in respect of works which they had carried out under a construction contract, and which sum was retained by the garnishee as retention money for the purpose of compensating the latter for defects in the works carried out by the judgment creditor could be garished under O. 49 r. 1 of the Rules of the High Court 1980.

The construction contract was not produced, but the affidavit deposed by the chairman of the garnishee company asserted:

(a) The works under the contract were divided into two packages *viz.* package 2 and package 4 and a sum of RM101,716.51 was retained by the garnishee as retention money.

(b) The judgment debtor had completed the work in respect of package 2 and it had been paid in full. Although it was not due and payable until 17 June 1988, nevertheless it was released upon production of a bank guarantee.

(c) As for package 4 there was still a balance of RM15,000 from the contract sum which had to be paid to the judgment debtor and this sum was due upon the issuance of the certificate of completion of the works and the said certificate had not been issued as at that date.

The garnishee argued that there was no money or debt due and owing from the garnishee to the judgment debtor. These were the crucial elements to be satisfied under O. 49 r. 1, for the issue of a garnishment order.

Held:

[1] The definition of these words have received judicial consideration. From the existing case law the following propositions may be enunciated:

(a) No garnishee order may be made unless some person at the time the order was made was indebted to the judgment debtor. If there was a debt *in presenti* an order could certainly be made to attach the debt.

(b) If there was no debt *in presenti*, but there was a debt in existence, *debitum in presenti*, but payable in the future, such an order could still be made with regard to the debt, whether legal or equitable.

(c) The words "or accruing" were intended to apply to those cases in which there were *debita in praesenti, solvenda in futuro* (debts owed at present time payable in the future). It was not enough to show that it was probable that there soon would be a debt but it must be shown that there was a debt.

(d) A *debitum in presenti* not yet actually payable was nevertheless a debt which was represented by an existing obligation.

[2] There was no doubt that the holding back of the said sum albeit as retention money, constituted a debt due from the garnishee to the judgment debtor although it was payable *in futuro*. Although there was a possibility that the fund may have to be drawn upon to rectify the defects in the work carried out by the judgment debtor, in garnishing proceedings the law does not recognize a debt that would probably arise in the future or however likely it may arise. The sum of RM65,801.98 retained by the garnishee could rightfully be attached. However the retention money in the sum of RM45,491.22 under package 2 which was released to the judgment debtor on production of a bank guarantee could not be attached as a garnishee order could only operate on a debt due and owing by the garnishee to the judgment debtor and could not operate in a transaction involving a third party who was not a party to the proceeding.

[3] When the retention money was a fixed sum which had already been earned by the judgment debtor the argument that until and unless the architect issued certificate of payment there was no money due from the garhishee to the judgment debtor, could not be maintained. The retention money had been carved out of the contract price out of that part of the work already done and there could be no dispute that it was a debt due from the garnishee to the judgment debtor, albeit payable after the expiry of the defective liability period.

[Appeal dismissed with costs.]

Cases referred to:
Tapp v. Jones: Pooley Garnishee [1875] LR 10 QB 591
Webb v. Stenton [1883] 11 QB 518
O'Driscoll v. Manchester Insurance Committee [1915] 3 KB 499
Hall v. Pritchett - A Corporation of Hudderfield Garnishee [1877] 3 QBD 215
Dunlop & Ranken Ltd. v. Hendall Steel Structures Ltd. (Pitchers Ltd. Garnishees) [1975] 3 All ER 344

Legislation referred to:
Rules of the High Court 1980, O. 49 r. 1

Other sources referred to:
Hudson's Building and Engineering Contracts, 9th Edn., p. 575
Engineering Law and ICE Contracts, Max Abrahamson, 4th Edn. p. 271

For the garnishee - Koh Teck Wah; M/s. Nordin Torji & Yussof Ahmad
For the judgment creditor - Poh Ah Loy @ Poh Ah Ley; M/s. Lim Huck Aik & Co.

JUDGMENT

Lim Beng Choon J:

On 9 August 1987, the Senior Assistant Registrar of this Court ("the SAR") made absolute a garnishment order *nisi* against the garnishee, directing the garnishee to satisfy the judgment recovered by the judgment creditor against the judgment debtor, out of certain sums of money which were alleged to be owing or accruing from the garnishee to the judgment debtor. The

garnishee was also directed to appear before the said SAR on 2 September 1987 for the purpose of settling the amount to be garnished. The garnishee, being dissatisfied with the order of the SAR, now appeals to me to set aside the said order.

In order to appreciate the issue raised in this appeal, it is necessary to give a brief summary of the events leading to this appeal. On 17 February 1987 the judgment creditor instituted an action as plantiffs under Civil Suit No. 24-17-87 of the High Court Alor Setar against the judgment debtor (the defendants in that action). In that civil suit, the plaintiffs claimed that the defendants were indebted to them in the sum of RM66,937.70, being the amount owed by the plaintiffs, and particulars of the transactions had been rendered to the defendants. Despite numerous requests for payment made by the plaintiffs, including a notice of demand in writing dated 12 January 1987 issued by the plaintiffs' solicitors to the defendants demanding for the payment of the amount owed to them, the defendants failed to settle the said amount. The plaintiffs, therefore, prayed for judgment against the defendants for the aforesaid sum including interests and costs. As the defendants in that suit failed to enter appearance, the plaintiffs obtained a certificate of non-appearance firm this Court on 18 February 1987. In the result, the plaintiffs entered judgment in default of appearance on the same day. The judgment was duly drawn up and extracted on 4 March 1987 whereby the defendants were directed to pay the plaintiffs a sum of RM66,937.70 together with interest at the rate of 8% per annum as from 12 January 1987 till the date of realisation and costs. As the judgment sum remained unsatisfied, the judgment creditor made a number of *ex parte* applications under O. 49 r. 2 directing certain purported debtors, who were said to be indebted to the judgment debtor, to show cause as to why the amount of the debts owed by those purported debtors should not be garnished. For some reason or other, no further steps were taken by the judgment creditor to pursue the matter against those purported debtors. On 5 July 1987, the judgment creditor, in desperation to recover the judgment sum, made another *ex parte* application for, and obtained a garnishment order *nisi* ordering the garnishee to appear and show cause. In response to the order *nisi*, one En. Adnan Mahidin, the chairman of the garnishee company, filed in an affidavit on 22 July 1987 by which it was contended that there was no money or debt due and owing from the garnishee to the judgment debtor. Despite this contention, the SAR, after hearing the respective Counsel for the garnishee and the judgment creditor, made absolute the order *nisi* as stated above.

The sole issue arising from this appeal is, whether the sum of RM101,716.51, already earned by the judgment debtor in respect of the works which they had carried out under the contract for the construction of the Jitra/Alor Setar Highway Project, and which sum was retained by the garnishee as retention money for the purpose of compensating the latter for defects in the works carried out by the judgment creditor, could be garnished under O. 49 r. 1 of the Rules of the High Court 1980.

It is to be noted that the words appearing in O. 49 r. 1 that are crucial in determining the issue in this appeal are:

> ... the amount of any debt due or accruing due to the judgment debtor from the garnishee.

The judicial definition of the crucial words has been propounded in numerous English cases, but, nevertheless, it has been stated that it is very often difficult to distinguish between a case where a debt has not accrued and there is no actual debt, and a case where there is a *debt debitum in praesenti solvendum in futuro*. However that may be, that matter was dealt with by Blackburn J in *Tapp v. Jones: Pooley Garnishee* [1875] LR 10 QB 591. There, the plaintiff obtained judgment in an action against the defendant on 21 November 1972, and a sum of £590 remained due upon the judgment. Sometime in September 1974, one Pooley,

entered into an agreement with the defendant under which Pooley was bound to pay to the defendant a sum of money by monthly instalments of £10 each. On 22 December 1874, one instalment being due, an order was made by a master under s. 61 of the Common Law Procedure Act 1854 attaching all debts owing or accruing from Pooley, who was by then made a garnishee, to answer the judgment debt. On 31 December 1874, another order was made by a master to the effect that, the garnishee should pay to the plaintiff the debt then due to the defendant, and also the accuring debts, as they became due. Writs of execution were issued in respect of the two instalments. The garnishee thereupon made an application to set aside the executions, and to set aside or alter the order of payment under which they were levied. The Counsel for the garnishee in his submission, firstly, contended that, although the said s. 61 authorised an order attaching "debts owing or accruing" but there must be a limit as regards to payment and the limit was to pay the debt that was actually due and payable. It must follow, therefore, that the master's order directing the garnishee to pay to the plaintiff, not only the debt then due and payable to the defendant, but also the accruing debts as they became due, was outside the provisions of the said s. 61.

Secondly, it was contended that, a right of set-off might accrue to the garnishee as against the judgment debtor, between the date of the attachment and the debt becoming payable. An order for payment made in advance would, therefore, deprive him of this right. Blackburn J in rejecting the first contention said at pp. 592 and 593:

> It is evident that the legislature had in view both present debt and future debt, *debita in praesenti, solvenda in futuro,* for it speaks in the earlier part of the section of "debts owing and accuring." Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered. It speaks merely of "the debt due." Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read "the debt due" as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they became payable, instead of making a fresh order as each falls due.

As regards to the second contention the learned Judge said (p. 593):

> I agree that no greater right is given to the creditor than the debtor had. It is obviously just that if a cross debt was due to the garnishee **at the date of the attachment** there should be a right of set-off in his favour, and I should strive hard to give effect to it if I could, though there would be difficulties in the way. But Mr. Williams goes further and maintains the **right to set of debts accruing after the attachment.** For this I see no ground. On the attachment the thing is **absolutely fixed; and there is no clause of mutual credit or set off.** (Emphasis mine)

Eight years later the Court of Appeal had occasion to determine the same issue in the case of *Webb v. Stenton* [1883] 11 QB 518. An instructive proposition was propounded by Lindley LJ when he said at pp. 526-528:

> I should say, from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro.* An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.

And the learned Judge went on to say:

> The result seems to me to be this; you may attach all debts, whether equitable or legal; but only debts can be attached;

Another interesting case is *O'Driscoll v. Manchester Insurance Committee* [1915] 3 KB 499. In that case, the insurance committee, acting under the National Insurance Act 1911 and the regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefits so received by the committee was to be the limit of the liability to the panel doctors, and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale, there was to be a *pro rata* reduction for each doctor. On the other hand, if it should be in excess of the amount required, the balance was to be distributed among the panel doctors. In the premises, it was held that, where a panel doctor had done work under his agreement with the insurance committee and the committee had received funds in respect of medical benefits from the National Insurance Commissioners, there was a debt owing or accruing from the insurance committee to the panel doctor which might be attached, notwithstanding as a matter of conclusion, the exact share payable to him might not yet have been ascertained. Another case, which I would like to refer to, is the case of *Hall v. Pritchett - A Corporation of Hudderfield Garnishee* [1877] Vol. 3 QBD 215. There, it was held that, if at the date of attachment, the judgment debtor had not yet performed the work which would entitle him to be paid, there would not be "a debt due, owing and accruing" to the judgment debtor.

From the principles enunciated in the aforesaid cases the following propositions can safely be distilled:

(1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti*, of course an order can be made to attach the debt.

(2) If there is not a debt payable *in presenti*, but there is a debt in existence, *debitum in presenti*, but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.

(3) The words "or accruing" are intended to apply to those cases in which there are *debita in praesenti, solvenda in futuro* (debts owned at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt, but it must be shown that there is a debt.

(4) A *debitum in presenti* not yet actually payable is nevertheless a debt which is represented by an existing obligation.

Before I proceed to deal with the issue in the present case, I must mention that it is clear that the garnishee, in challenging the right of the judgment creditor to obtain a garnishee order from this Court, is relying on certain terms of the contract executed between the garnishee and the judgment debtor to support its contention that there is no debt due by it to the judgment debtor. Despite its reliance on the contract, the garnishee did not deem it fit to produce at least the relevant parts of the contract to assist this Court. In such a situation this Court can only rely on the contents of the affidavit deposed by En. Adnan Mahidin, the chairman of the garnishee company dated 22 July 1987 (EnClause 21). The salient assertions deposed by the said chairman may be paraphrased as follows:

(1) The works under the contract were divided into two packages viz. package 2 and package 4 and a sum of RM101,716.51 was retained by the garnishee as retention money until the expiry of one year from the date of the issue of the certificate of completion of the works to ensure the garnishee could be adequately compensated for any defects arising out of the judgment debtor's work.

(2) The judgment debtor has completed the work in respect of package 2 and it has been paid in full. Although the retention money is not due and payable until 17 June 1988 nevertheless it was released to the judgment debtor on 26 May 1987 upon a production of a bank guarantee from the judgment debtor.

(3) As for package 4, there is still a balance of RM15,000 from the contract sum which has to be paid to the judgment debtor and this amount is due and payable upon the issuance of the certificate of completion of the works and the said certificate has not been issued as at to date.

The deponent then went on to say "there is no money or debt due and owing from the garnishee to the judgment debtor."

From the affidavit of En. Adnan Mahidin, it is clear that a sum of RM65,801.98 has been retained by the garnishee in respect of so much of the work under package 4 (see Exhibit "A1" annexed to the said affidavit) which has been done to the judgment debtor. That sum has been earned by the judgment debtor when he has done that much of the work in respect of package 4 and payment thereof has been made to it. It follows, therefore, the money that has been retained is money that still belongs to the judgment debtor. Accepting the fact that the garnishee has a right under the term of the contract entered into by the garnishee and the judgment debtor to retain the said sum as retention money, nevertheless it is judgment debtor's own hard-earned money that has been retained and not money which he has yet to be earned as in the case of *Hall v. Pritchett* (*supra*). In such a situation, it is beyond dispute that the holding back of the said sum, albeit as retention money, must constitute a debt due from the garnishee to the judgment debtor although it is payable *in futuro*. In short, it is a *debt debitum in presenti solvendum in futuro*. It may be true, as stated by En. Adnan Mahidin in his affidavit, that the retention money is retained in the power of the garnishee as a fund to be drawn upon should the occasion arise to rectify defects in the work carried out by the judgment debtor. But in garnishing proceedings the law would only acknowledge two kinds of debts, an existing debt payable *in presenti* or an existing debt payable *in futuro*. The law does not recognise a debt that probably will arise in the future or however likely it may arise (see *Webb v. Stenton* (*supra*) at p. 315). Putting the case of the garnishee at its highest, it has only shown to this Court that within, what is usually known in most, if not all, building and engineering contracts as the defective liability period, the garnishee may discover some defective works which would enable it to make a cross-claim against the judgment debtor. But in garnishing proceedings the law is concerned only with any cross-claim or cross-debt existing at the date of the attachment and not a cross-claim or cross-debt that may come into existence some time in the future (see the speech of Blackburn J in *Tapp v. Jones* (*supra*) at p. 593). For the reasons as stated above I hold that the sum of RM65,801.98 retained by the garnishee as retention money can rightfully be attached.

As regards to the retention money in the sum of RM45,491.22 under package 2, it has been asserted by En. Adnan Mahidin's affidavit that that sum had already been released to the judgment debtor on 26 May 1987 upon his production of a bank guarantee. In the circumstances, that amount cannot be attached as a garnishee order can only operate on debt due and owing by the garnishee to the judgment debtor. It cannot operate in a transaction involving a third person who is not a party to the proceeding.

Before I depart, I would like to say a few words with regard to the case of *Dunlop & Ranken Ltd. v. Hendall Steel Structures, Ltd. (Pitchers, Ltd. Garnishees)* [1957] 3 All ER 344, which the learned Counsel for the garnishee relied on strongly to support his submission that until

and unless the architect in the present project has issued a certificate of payment there was no money due from the garnishee to the judgment debtor. With due respect, I think the judgment in that case is distinguishable. In that case, the appeal was against an order of the District Registrar of the lower court making absolute a garnishee order *nisi* which had been obtained by Dunlop & Ranken Ltd., the judgment creditor, against Hendall Steel Structures Ltd. the judgment debtors, in respect of a sum of money which was said to have been owned by Pitchers Ltd. the garnishees to the judgment debtors. In arriving at their decisions, the learned Judges had to consider three important clauses in the RIBA form of contract entered between the building owner and the main contractor, who in that case, was the garnishee. The first of the three clauses was Clause 24 which provided:

> (a) At the period of interim certificates named in the appendix to these conditions **interim valuations shall be made whenever the architect considers them necessary,** and the contractor shall subject to Clause 21 of these conditions be entitled to receive within ten days of his written application for the same certificate from the architect stating the amount due to the contractor from the employer, and shall on presenting any such certificate to the employer be entitled to payment therefor within the period named in the appendix. (Emphasis is mine)

The next important clause was Clause 21 which further provided:

> (b) The sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days of receiving from the architect a certificate **including the value of such work, materials or goods** less only (i) any retention money which the contractor may be entitled to deduct, and (ii) a cash discount of 2½% per cent. (Emphasis is mine)

The aforesaid two clauses were deemed to have been included in the casual agreement made in the form of purchase orders issued by the main contractor, the garnishees, and the sub-contractor, the judgment debtors.

The third important clause appeared in the purchase order for steelwork issued by the garnishees to the judgment debtors which clause was in effect a fluctuation clause and which read as follows:

> Please: - (a) Submit your invoice in duplicate. (b) Quote this order number on your invoice. (c) **Advise both us and the architect immediately of any increase or decrease in cost of labour and materials which may be adjustable under the terms of the contract.** (Emphasis is mine)

In their consideration of the two clauses and the clause inserted in the purchase order for the steel work as adumbrated above, the learned Judges arrived at the following conclusions:

(1) In view of the fluctuation clause, it was clear that the contract price which was quoted in the sub-contract was not a firm price but depended on the rise and fall of prices both in the material and the labour market. (See the speech of Lord Goddard CJ at p. 348).

(2) Any interim payment would not accrue until the architect had made a valuation of the work done and materials supplied by the sub-contractor pursuant to the said Clause 24.

(3) The architect must issue a certificate to affirm the value of such work, and the materials and goods carried out and supplied, as the case may be, by the contractor. In arriving at their conclusions, it is clear that the learned Judges were of the view that, firstly, any claim made by the sub-contractor for work done and materials and goods supplied could not be entertained until the architect had made a valuation of such works and

materials and goods purported to have been supplied by the sub-contractor and only when the valuation had been carried out no monetary value could be ascribed to the work purported to have been done and the materials and goods purported to have been supplied by the sub-contractor; hence no money was due and payable to the sub-contractor until a valuation had been carried out by the architect who would thereupon issue a certificate of payment. It follows therefore without the architect's valuation the claim of the contractor was not only unascertainable yet but in effect it was unascertainable at all at least contractually. In the result, there was therefore no money due from the garnishees to the judgment debtors. In support of this proposition certain passages from the learned judges are relevant and I shall, firstly, quote a passage from the speech of Lord Goddard CJ at p. 348:

> I think this is not a case of *debitum in praesenti solvendum in futuro*. It is not a mere case of putting off payment; it is that the judgment debtors have not a right to be paid, and, therefore, that there is no debt, until there is a certificate certifying the amount which is to be paid for this steelwork which was the subject of the order which was given by the garnishees to the judgment debtors.

Another passage which is equally important can be found in the judgment of Havers J who said at p. 349:

> It is clear therefore, that, both parties contemplated that that specified sum was not a fixed sum but might fluctuate up or down in accordance with the provisions for fluctuation in the contract.

His Lordship then went on to say:

> The real question, therefore, arises as to the true interpretation of those words "in accordance with the certificates". I share the view of my brethren that those words really mean "if and when a certificate is given". If that is the true construction, it is clear that there was no debt owing or accruing at the time the garnishee order *nisi* was made.

Now, the facts in the instant appeal are clearly different, in that the retention money was in effect a fixed sum which has already been earned by the judgment debtor. In other words, the retention money was carved out of the contract price of that part of the work which has already been done by the sub-contractor, and, thereby he had earned the money arising from the carrying out of such work. There cannot, therefore, be any dispute that the garnishee, in retaining the fixed sum of money belonging to the judgment debtor, is a debt due from the garnishee to the judgment debtor, albeit payable after the expiry of the defective liability period.

It is also interesting to note that the views expressed by the learned Judges in the *Dunlop & Ranken case* were criticised by the learned author of *Hudsons' Building and Engineering Contracts*, 9th Edn. at p. 575 where the learned author said:

> In *Tapp v. Jones*, however attachment was permitted of a debt repayable by instalments not yet due at the time of attachment, and this principle was approved in the judgments in the *O'Driscoll* case. Applying this reasoning to building cases, it would seem strongly arguable that where work has been done but the price is not yet payable by reason of the necessary certificate not having been issued, or because the date of payment has not yet arrived (as in the case of retention moneys) that there is an existing debt though not yet payable. Thus Lord Blackburn, in the case involving the construction of a guarantee for the completion of building work, said of a clause in the usual form of payment upon a certificate of completion: "Upon the completion of the building there would be a debt due to Thick, but not payable until Griffith had certified the fact of completion." This view appears to have been accepted

> in Cananda in *Sandy v. Yukon Construction Co. Ltd.*, but rejected in the *Dunlop & Ranken and Grant Plant Hire* cases. There is much to commend the view of the Canadian Court, and it is suggested that the matter requires reconsideration by the English Courts.

In Max Abrahamson's Book in *Engineering Law and ICE Contracts*, 4th Edn. p. 271 the learned author said quite unequivocably that:

> The essential ingredient was that as retention money the money claimed was a quantified sum and was undisputable due.

To my mind the principles discussed in the earlier part of this judgment are encapsulated in the short sentence.

In the circumstances the order of the SAR is affirmed and this appeal brought by the garnishee is dismissed with costs.

Also found at [1988] 2 CLJ 194